IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARGARET OROSZ, Plaintiff, v. REGENERON PHARMACEUTICALS, INC., Defendant.	CIVIL ACTION NO: 7:15-cv-08504-NSR-LMS

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MOTION TO DISMISS COUNT IV OF SECOND AMENDED COMPLAINT

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I. PRELIMINARY STATEMENT

On June 5, 2013, Defendant Regeneron Pharmaceuticals, Inc. (hereinafter "Regeneron") hired Plaintiff Margaret Orosz (hereinafter "Ms. Orosz) as a consultant architect through Microsol Resources Corp., a staffing company and Ms. Orosz's co-employer). Over the course of the next year, Ms. Orosz's performed so well that, in November 2013, Regeneron informed her that it would hire her as a permanent employee. Thereafter, Regeneron and Ms. Orosz worked together to create a position for her.

Though Regeneron valued Ms. Orosz's skills enough to create a permanent position for her, it had concerns about Ms. Orosz's desire to start a family. In August 2013, Ms. Orosz informed her supervisor, Patricia Hamilton, that she was undergoing In-Vitro Fertilization ("IVF") treatments in order to become pregnant. Supervisor Hamilton responded that Ms. Orosz should not tell anyone at Regeneron that she was trying to have children. During Ms. Orosz's employment with Regeneron, Supervisor Hamilton and other Regeneron employees made it clear to Ms. Orosz that Regeneron negatively viewed the prospect of her becoming pregnant.

Ms. Orosz learned just how much Regeneron disliked the idea of her becoming pregnant when Regeneron informed her that it would not be hiring her for the position it had created for her just two (2) days after learning Ms. Orosz was pregnant. Regeneron informed Ms. Orosz that it had decided not to hire her for the position, because she lacked experience in BIM/Revit, an architecture modeling program. Up until that point in time, BIM/Revit experience had *never* been a requirement for the position. Regeneron changed the job description to include this requirement in order to create a pretext for denying Ms. Orosz the position. Thereafter, Regeneron took the job description that Ms. Orosz wrote and edited it to add the BIM/Revit experience requirement and sought applicants for the position.

On October 28, 2015, Ms. Orosz filed a complaint alleging, *inter allia,* that Regeneron violated Title VII by firing her due to her pregnancy. On May 20, 2016, Ms. Orosz filed her Second Amended Complaint ("Complaint) adding a claim for failure to hire under Title VII. Regeneron now seeks to dismiss Ms. Orosz's failure-to-hire claim under Federal Rule of Civil Procedure 12(b)(6). Regeneron primarily argues that Ms. Orosz has failed to state a *prima facie* case for a failure-to-hire claim, because Ms. Orosz has not alleged that Regeneron ever created the position. In arguing same, Regeneron asks this Court to construe the Complaint in the light most favorable to Regeneron rather than Ms. Orosz and to make unreasonable inferences for its benefit. For example, Regeneron argues that since it never created a position specifically called "Facilities Architect," which is the position for which Ms. Orosz wrote a job description, Ms. Orosz could not and did not apply for the position. Regeneron neglects to inform the Court that it *did create* a position called BIM/AutoCad Specialist, which had a job description largely identical to the description of Facilities Architect, except it required BIM/Revit experience. Clearly, the two "different" positions are substantively the same and therefore Regeneron did create the position for which Ms. Orosz applied and was rejected.

Viewed in the light *most favorable to Ms. Orosz,* her Complaint alleges sufficient facts to state a failure-to-hire claim, and this Court should permit Ms. Orosz to engage in discovery on this claim.

In making arguments such as the one described above, Regeneron also asks this Court to consider several exhibits that Ms. Orosz did not attach to her Complaint. As explained herein, such exhibits were neither incorporated into nor are integral to the Complaint and are therefore extraneous. Regeneron effectively has asked the Court to weigh the merits of Ms. Orosz's claim without providing Ms. Orosz the opportunity to engage in discovery. The Court should decline

Regeneron's invitation to consider exhibits improperly submitted to support a motion to dismiss and instead convert Regeneron's motion to a motion for summary judgment under Federal Rule of Civil Procedure and permit the Parties to conduct discovery on Ms. Orosz's failure-to-hire claim so that she has the opportunity to obtain and proffer her own evidence. At a minimum, the Court should exclude the exhibits and not consider them when deciding whether Ms. Orosz has pled sufficient facts to state a failure-to-hire claim.

II. STATEMENT OF FACTS

Ms. Orosz incorporates by reference paragraphs 11-90 of her Second Amended Complaint (ECF Doc. No. 18).

III. STANDARD OR REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), *quoting Conley v. Gibson,* 355 U.S. 41, 47 (1957). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). A complaint is plausible on its face the factual allegations made therein "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. While a complaint must include more than threadbare recitals of the elements of a cause of action, the complaint need not include "detailed factual allegations." *Twombly*, 550 U.S. at 555. In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should first assume that all well-pleaded factual allegations are true and then "determine whether they plausibly give rise to an entitlement to relief." *Id*. at 679. In doing so, the court must accept all well-plead factual allegations as true, and draw all reasonable inferences in the light most favorable to the plaintiff. *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996).

IV. LEGAL ARGUMENT

1. Regeneron's Extrinsic Documents Should Not Be Considered

Regeneron relies on documents that Ms. Orosz did not attach to her Second Amended Complaint to support its motion to dismiss. Specifically, Regneron relies on a position description and several emails between Ms. Orosz and its employees. (See Def.'s Motion, Exhibits B, C, D, and E). As an initial matter, the Court must decide whether it can consider these exhibits when deciding the instant motion.

In considering a motion to dismiss, "the Court is entitled to consider facts alleged in the complaint and documents attached to it or incorporated in it by reference, documents 'integral' to the complaint and relied upon in it, and facts of which judicial notice may properly be taken." *Heckman v. Town of Hempstead*, 568 Fed. Appx. 41, 43 (2d Cir. 2014). Ms. Orosz did not attach any documents to her Complaint. Therefore, in order to consider Defendant's exhibits, this Court must find that such documents were incorporated into the Complaint by reference or are integral to the Complaint and relied upon in it.

Courts may deem a document incorporated into a complaint if it is a document that the plaintiff "either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000); *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002) (holding that reliance is necessary as "mere notice or possession is not enough"). "Limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint." *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004).

If a document is not incorporated by reference into a complaint, the Court may still consider it "where the complaint relies heavily upon its terms and effect, thereby rendering the document 'integral' to the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (internal quotations omitted). "A document is not 'integral' simply because its contents are highly relevant to a plaintiff's allegations, but only when it is clear that the plaintiff relied on the document in preparing his complaint." *Tubbs v. Stony Brook Univ.*, 2016 U.S. Dist. LEXIS 28465, *13 (S.D.N.Y. 2016) (Roman, J.) (quoting *Williams v. City of New York*, 2015 U.S. Dist. LEXIS 94895 (S.D.N.Y. 2016)) (reconsideration denied).

In the event that this Court determines that Regeneron improperly submitted the exhibits for consideration of its motion under Rule 12(b)(6), "the materials must either be excluded, or the motion must be converted to one for summary judgment under Federal Rule of Civil Procedure 56, after affording the parties the opportunity to conduct appropriate discovery and submit additional supporting materials." *Id.* at *11 (citing *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000)).

In *Tubbs*, this Court recently analyzed the above standard for considering documents not attached to a complaint when deciding a motion to dismiss. *Tubbs*, 2016 U.S. Dist. LEXIS 28465. In that case, the defendants submitted 13 exhibits that they argued were integral to the plaintiff's complaint and that the plaintiff opposed.[1] *Id.* at *13-15. Even though the plaintiff possessed or knew about each of the 13 documents at the time she filed her complaint, she

[1] The defendants in *Tubbs* submitted a total of 21 exhibits. The plaintiff conceded that two of the exhibits were integral to her complaint, and this Court found that the six other exhibits could not be integral to the complaint, because plaintiff neither had possession nor knowledge of the documents at the time she filed her complaint. *Id.* at 14-15.

opposed the count's consideration of the documents on the grounds that they were not integral to her complaint, which included claims that Stony Brook University violated Title IX by failing to properly respond to her report of a sexual assault by a fellow student. *Id.* at *1-2, 13. Among the 13 exhibits were two sexual assault reporting forms that she signed, her statement to the police, and six emails exchanged between her and the school regarding her sexual assault complaint. *Id.* at *13-14. Despite the plaintiff's clear familiarity with the documents and their close relation to her claims under Title IX and the fact that she generally referenced them in the complaint, this Court held that all 13 exhibits were **not** integral to the complaint. *Id.* at *15-17. The plaintiff's allegations in her complaint simply did not rely on or require knowledge of the contents of the exhibits. *Id.* at *16. Rather, the defendants' exhibits were "evidence tending to prove or disprove plaintiff's allegations; consideration of such evidence is wholly improper on a motion to dismiss, where the inquiry is limited to whether plaintiff's allegations, accepted as true, state a claim as a matter of law." *Id.* at *17.

In the instant case, Regeneron's exhibits were neither incorporated by reference into the Complaint nor integral to the Complaint. As explained above, it is not enough for a plaintiff to have knowledge of or have possession of the documents at the time she filed her complaint; she must have *relied* on them. *Id.* at 15-17. It is important to note that Regeneron has not provided this Court with any reasons why these documents should be considered except a bald statement, in a footnote, that Ms. Orosz relied on them. (See Def. Brief at p. 2). While Ms. Orosz did have knowledge of Regeneron's exhibits, her allegations in the Complaint do not rely on or require knowledge of the contents of same. Ms. Orosz did not rely on the actual position description in order to allege that Regeneron promised to hire her as a permanent employee and that she drafted a position description for her new position. (See ECF Doc. No. 18, ¶¶ 42, 45.) The position description's existence is just evidence that tends to prove or disprove said allegations. Likewise, Ms. Orosz did not rely on the emails for any allegation made in the complaint.

Regeneron has submitted its exhibits for the same purpose that the defendants in *Tubbs* submitted their exhibits. Regeneron believes, and spends most its brief arguing, that its exhibits tend to disprove Ms. Orosz's allegations. Regeneron argues that the position description for "Facilities Architect" and email correspondence between Ms. Orosz and Regeneron employees demonstrate that Regeneron never created the position that Ms. Orosz claims Regeneron denied her and Regeneron never sought applicants for the position after rejecting Ms. Orosz since it never created the position in the first place. Regeneron even goes so far as to state that "the record is undisputed – the Facilities Architect position was not created and Regeneron did not seek any applicants for it." (Def. Brief at p. 7). This is a merits argument that Regeneron may make in a motion for summary judgment after the Parties have engaged in discovery, but such argument is "wholly improper on a motion to dismiss." *Tubbs*, 2016 U.S. Dist. LEXIS 28465, *17.

Accordingly, this Court should either exclude Regeneron's improperly submitted exhibits or convert the instant motion to a motion for summary judgment under Rule 56 and provide the Parties with the opportunity to conduct appropriate discovery.

2. Ms. Orosz's Second Amended Complaint Pleads a Cognizable Failure-To-Hire Claim under Title VII

In order to state a claim for failure to hire (or promote) under Title VII, a plaintiff must allege that: "1) she is a member of a protected class; 2) she applied and was qualified for a job which the employer was seeking applicants; 3) she was rejected for the position; and 4) the position remained open and the employer continued to seek applicants having the plaintiff's qualifications." *Brown v. Coach Stores*, 163 F.3d 706, 709 (2d Cir. 1998) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). However, "the pleading requirements in discrimination cases are **very lenient, *even de minimis.*** *Id*. at 710 (emphasis added). Therefore, while the elements stated above provide an appropriate model for *prima facie* cases of discrimination, the "standard is not inflexible." *Id*. For example, courts have permitted plaintiffs to proceed with failure-to-hire claims without alleging that they made a specific application for a position "where the facts of a particular case make an allegation of a specific application a quixotic requirement." *Id*.

A. Ms. Orosz has alleged that Regeneron created the position that it denied her after learning she was pregnant

In the Complaint, Ms. Orosz alleges that during the time she worked for Regeneron as a consultant jointly employed by Regeneron and Microsol Resources, Inc., Regeneron created a permanent position and promised it to her. (See ECF Doc No. 18 at ¶¶ 42-43, 44-45.) Regeneron then denied her the position after learning she was pregnant. (See Id. at ¶¶ 52-57.) Ms. Orosz further alleges that Regeneron sought applicants for the same position after rejecting her. (See Id. at ¶ 58.) While the facts of Ms. Orosz's case may be uncommon, they nonetheless are sufficient to state a claim for failure-to-hire under Title VII.

Regeneron's argument is based on its assertion that Regeneron never created the position that Ms. Orosz alleges Regeneron denied her. Regeneron claims that Ms. Orosz did not allege in her Complaint that Regeneron actually created the position at issue. (See Def. Brief at p. 8.) In claiming same, Regeneron asks this Court to construe the Complaint's allegations in the light most favorable to Regeneron rather than Ms. Orosz. For if the Court construes the Complaint in the light most favorable to Ms. Orosz, as is required on a motion to dismiss, there can be no conclusion other than that Ms. Orosz alleged that Regeneron created the position. In the Complaint, Ms. Orosz alleges that: 1) Regeneron informed Ms. Orosz that she would be hired as a permanent employee (See ECF Doc. No. 18, ¶ 42); 2) a job description was drafted for Ms. Orosz's permanent position (See Id. at ¶ 45); 3) Regeneron informed her that it allegedly decided not to hire her for the position due to her lack of BIM experience (See Id. at ¶¶ 53-54); and 4) Regeneron continued to seek applicants for the position (See Id. at ¶ 58). Given the fact that Ms. Orosz alleges Regeneron promised her a position, denied her for the position, and continued to seek applicants for the position, the Court can reasonably infer that Ms. Orosz has alleged that Regeneron created the position.

In construing the alleged facts in its own favor, Regeneron also engages in deceptive semantics by assuring the Court that "the *Facilities Architect* position was not created and Regeneron did not seek any applicants for it." (See Def. Brief at p. 7) (emphasis added.) What Regeneron fails to tell the Court is that while it may not have created a position called "Facilities Architect," it did create a position called "BIM/AutoCad Specialist" that had a job description largely identical to the one for Facilities Architect. (See Job Description for BIM/AutoCad Specialist attached to the Declaration of Matthew Miller, Esq. as Exhibit A).[2] As Ms. Orosz alleged in the Complaint, Regeneron added the requirement that applicants have BIM/Revit experience to create a pretext for denying her the position. (See ECF Doc. No. 18 at ¶¶ 54-56.) As a comparison of the two job descriptions demonstrates, Regeneron's only substantive change

[2] Ms. Orosz has submitted Exhibit A for this Court's consideration only if the Court determines that Regeneron's exhibits were incorporated into the Complaint by reference and considers same when determining whether Ms. Orosz has pled sufficient facts to support a failure-to-hire claim. Ms. Orosz does not contend that her exhibit was incorporated by reference into or is integral to her Complaint.

to the description for Facilities Architect was the addition of references to the need for BIM/Revit experience. (See Miller Decl. at Exhibit B.)[3]

Common sense dictates that simply changing a position's title and adding a job requirement does not create an entirely new position. And for the purposes of deciding this motion, the Court can reasonably infer that the position that Ms. Orosz alleged Regeneron created for her remained the same position even though Regeneron added the BIM experience requirement after learning that Ms. Orosz was pregnant.

B. Ms. Orosz applied for and was qualified for the position

Regeneron bases its argument that Ms. Orosz has not alleged that she applied for the position on its assertion that it never created the position. (See Def. Brief at p. 6). Therefore, Regeneron concedes that if it did create the position, Ms. Orosz applied for it. (See Id. at pp. 6-7.) Even if it created the position, Regeneron argues, Ms. Orosz was not qualified for it and therefore still cannot meet the second element of the claim. (See Id.) Before addressing this argument, it is important to note that Regeneron has not argued that Ms. Orosz did not make a "specific application" as generally required in failure-to-hire claims. Regeneron has conceded that Ms. Orosz either did make a specific application or qualifies for the exception to this requirement. To qualify for the exception to the formal application requirement, a plaintiff must show "that 1) the vacancy at issue was not posted, and 2) the employee either had no knowledge

[3] Undersigned counsel created Exhibit B by comparing both the Facilities Architect and BIM/AutoCad Specialist job descriptions using Microsoft Word. The edits demonstrate the substantive (in Ms. Orosz's opinion) changes made to the original Facilities Architect description in order to create the BIM/AutoCad Specialist description. Regeneron made other edits to the original description that are not shown in this exhibit, because they were either changes made for superficial/aesthetic purposes or they were deletions of duties/requirements of the Facilities Architect position.

of the vacancy before it was filled or b) attempted to apply for it through informal procedures endorsed by the employer." *Petrosino v. Bell Atlantic*, 285 F.3d 210, 227 (2d Cir. 2004). Ms. Orosz has alleged sufficient facts to show that Regeneron did not post the position prior to rejecting her for same (since Regeneron created it for her) and she applied for the position through the informal procedure endorsed by Regeneron (i.e. the ongoing discussions regarding her transition to the position). (See ECF Doc. No. 18 at ¶¶ 42-43, 46-47.)

Accordingly, Ms. Orosz has pled sufficient facts to demonstrate that she applied for the position.

As to Regeneron's assertion that Ms. Orosz was not qualified for the position, Regeneron has failed to provide any authority for its position that a plaintiff cannot plead a *prima facie* case for a failure-to-hire claim where the defendant adds a requirement for the position in order to exclude the plaintiff from consideration. (See Def. Brief at pp. 6-7.) Instead, Defendant simply concludes that Regeneron's desire for an applicant with BIM experience makes it impossible for Ms. Orosz to meet the second element. Though rare, some courts have addressed failure-to-claim cases where the defendant changed a job description in order to exclude the plaintiff. In *Weeks v. Mich., Dep't of Cmty. Health*, the Sixth Circuit Court of Appeals reversed a district court's grant of summary judgment where the plaintiff alleged that his employer engaged in this same conduct. *Weeks*, 587 Fed. Appx. 850 (6th Cir. 2014). The court held that "[a] reasonably jury could believe that the alleged policy requiring clinical experience was a tactical excuse to intentionally exclude plaintiff from qualifying for the promotion." *Id*. at 858. Admittedly, the defendant in *Weeks* did not appear to argue that the plaintiff could not meet his burden to show he was qualified for the position by virtue of the added requirement, and so the Sixth Circuit Court did not address that precise argument. However, common sense dictates that employers should not be permitted to escape liability for refusing to hire (or promote) an individual based on a protected characteristic by simply adding a requirement to the job description that renders the individual unqualified.

Accordingly, Ms. Orosz has pled sufficient facts to meet the second element of her failure-to-hire claim.

C. Ms. Orosz has sufficiently pled that Regeneron rejected her for the position and continued to seek applicants for same

Regeneron's arguments supporting its claim that Ms. Orosz has not sufficiently pled the third and fourth elements of her failure-to-hire claim are based on its central claim that it never created the position at issue. (See Def. Brief at pp. 7-8.) As explained in detail above, Regeneron's argument that Ms. Orosz did not allege in her Complaint that Regeneron created the position holds water only if the Court reads the Complaint in the light most favorable to Regeneron and makes *unreasonable* inferences like inferring that the simple change in a position's title and the addition of a requirement for the job creates an entirely new position. As the Court must construe the Complaint in the direct opposite manner, Ms. Orosz has alleged sufficient facts to allege that the position was created and that she applied to same. Accordingly, Ms. Orosz's allegations that Regeneron denied her the position and continued seeking applicants for same require no analysis as they are straight-forward and sufficient to meet the third and fourth elements to state a failure-to-hire claim.

VI. CONCLUSION

For the reasons set forth above, Ms. Orosz respectfully requests that this Court deny Regeneron's Motion to Dismiss.

(*Signature on next page)*

Respectfully submitted,

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